FRANCIS ANTONYSAMY

v.

PP

FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ
PAJAN SINGH GILL FCJ
AUGUSTINE PAUL JCA
[CRIMINAL APPEAL NO: 05-66-2002 (C)]
21 MARCH 2005

EVIDENCE: *Statement - Cautioned statement admitted in evidence - Admissibility - Whether evidence should be adduced to show actual words of caution administered - Whether voluntariness of statement established*

EVIDENCE: *Information leading to fact discovered - Admissibility - Whether admissibility depends on voluntariness - Whether privilege against self-incrimination applies - Evidence Act 1950, s. 27 - Criminal Procedure Code, s. 112*

EVIDENCE: *Accomplice - Whether witness is - Whether an accessory after the fact - Whether evidence corroborated*

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Appeal against conviction and death sentence - Whether offence proved beyond reasonable doubt - Whether defence of intoxication failed*

The High Court convicted the accused of murder under s. 302 of the Penal Code and imposed the mandatory death sentence. The accused's appeal to the Court of Appeal was dismissed and that led to this appeal before the Federal Court. The issues were: (1) whether evidence of the actual words of the caution administered should be adduced; (2) whether the cautioned statement that was recorded from the accused was voluntary; (3) whether the information supplied by the accused under s. 27 of the Evidence Act 1950 ('EA') was admissible; (4) whether the privilege against self-incrimination applied; (5) whether the testimony of PW4, an accomplice, could be used against the accused; and (5) whether the defence of intoxication was correctly rejected by the trial judge.

Held (dismissing the appeal and confirming conviction and sentence) Per Augustine Paul JCA delivering the judgment of the court:

[1] In the absence of any evidence by the recording officer of the actual words of the caution that was administered, evidence of such words in the cautioned statement could not be used to supplement the deficient evidence. In any event he did not state that the caution that he read was as recorded in the cautioned statement. The result was that there was no evidence before the court in order for it to be satisfied that the caution that was administered was as prescribed or contained words to the like effect. (p 493 b-c)

[2] No evidence was adduced by the prosecution to negate the allegation by the accused that he was assaulted by the police when he was in remand. While it was correctly recognised by the learned judge that the prosecution must prove beyond reasonable doubt that the cautioned statement was given voluntarily, it was an error of law to state that the defence must prove an allegation of assault on a balance of probabilities. It was also an error of law to suggest that the burden on the prosecution was only to negate allegations that had been raised by the defence. In order to discharge the legal burden that it carried, the prosecution ought to have called witnesses to testify on matters that transpired from the time of the arrest of the accused until he gave his cautioned statement. Failure to do so only meant that the prosecution had not fully discharged the legal burden that it had to satisfy. In the circumstances, the cautioned statement given by the accused was not admissible as there was no evidence of the actual words of the caution that was administered and as the prosecution failed to call material witnesses to establish that the statement made was voluntarily. (pp 493 d-h, 494 a & 496 c-d)

[3] The privilege against self-incrimination can be expressly or impliedly abrogated by statute. The object of the voluntariness rule in s. 24 EA was to preserve the privilege. However, a long line of authorities have established that s. 27 EA is independent and is not subject to the voluntariness rule in s. 24 EA. Accordingly, the privilege against self-incrimination that is manifested in an involuntary statement or in a statement made in breach of the requirements of s. 112 Criminal Procedure Code must be deemed impliedly abrogated as far as s. 27 EA is concerned. What therefore remained for consideration was whether the High Court ought to have excluded the information supplied by the accused under s. 27 EA in the exercise of its discretion. The burden of proof on that

issue was on the defence. The police officer to whom the information was supplied was not cross-examined on that issue when he gave evidence. In the circumstances, the evidence of the accused that he did not supply the information in question had very little value with the result that there was insufficient material before the court to exercise its discretion in favour of the accused. (pp 497 e, 498 d, 499 b & 502 f-g)

[4] The accused supplied information to the police twice with regard to the burying of the head of the victim. As the first information supplied under s. 27 EA was not specific, it was inadmissible together with P46A that related to it. That did not affect the admissibility of the second statement on the same subject matter. (pp 502 h & 504 e)

[5] PW4 neither committed the crime nor did he assist the accused in committing it. Neither did he procure its commission. As he assisted the accused in concealing the crime he was clearly an accessory after the fact. On the facts, PW4 played a very active role in his capacity as an accessory after the fact. His evidence must therefore be corroborated. Evidence in corroboration must be independent testimony that affects the accused by connecting or tending to connect him with the crime. Corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. There was sufficient evidence to support the testimony of PW4 that not only was the crime committed but also that it was committed by the accused. The evidence of PW4 could therefore be acted upon to make out a case against the accused. (pp 505 d, 506 e-g & 507 f)

[6] The learned judge correctly rejected the defence of intoxication when he found no scientific evidence to support it and after having considered the conduct of the accused both before and after the commission of the crime. It must be observed that what is in issue in a defence of intoxication is the state of mind of the person concerned in order to determine whether he could have formed the necessary intention. The best evidence to establish his state of mind is his conduct prior to, at the time of, and after the offence as different people react differently to the same blood alcohol level. Scientific evidence is significant to explain the conduct of the person but its absence cannot be fatal. (pp 508 f-h & 509 a-b)

a *[**Bahasa Malaysia** Translation Of Headnotes*

Mahkamah Tinggi telah mensabitkan tertuduh dengan kesalahan bunuh di bawah s. 302 Kanun Keseksaan dan menjatuhkan hukuman mati ke atasnya. Rayuan tertuduh ke Mahkamah Rayuan telah ditolak, sekaligus membangkitkan rayuan seterusnya ke Mahkamah Persekutuan. Isu-isunya adalah: (1) sama ada *b* keterangan harus dikemukakan mengenai kata-kata sebenar amaran yang diberikan; (2) sama ada kenyataan beramaran yang direkod dari tertuduh diberi dengan sukarela; (3) sama ada maklumat yang diberikan tertuduh di bawah s. 27 Akta Keterangan 1950 ('AK') boleh diterima masuk; (4) sama ada perlindungan terhadap penyalahan diri (self-incrimination) terpakai; (5) sama *c* ada keterangan PW4, seorang rakan sejenayah, boleh digunakan terhadap tertuduh; dan (6) sama ada yang arif hakim wajar dalam menolak pembelaan mabuk.

Diputuskan (menolak rayuan dan mengesahkan sabitan dan hukuman)
d **Oleh Augustine Paul HMR menyampaikan penghakiman mahkamah:**

[1] Dengan ketiadaan sebarang keterangan oleh pegawai perekod tentang kata-kata sebenar amaran yang diberikan, keterangan mengenai perkataan-perkataan tersebut di dalam kenyataan beramaran tidak boleh digunakan untuk melengkapkan keterangan yang cacat. Walau apapun, beliau tidak *e* menyatakan bahawa amaran yang diberikan adalah sepertimana yang direkodkan di dalam kenyatan beramaran. Akibatnya adalah bahawa tidak terdapat sebarang keterangan di hadapan mahkamah yang membolehkan mahkamah berpuas hati bahawa amaran yang diberi adalah seperti yang ditetapkan atau mengandungi perkataan yang sepertinya.

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[2] Tiada keterangan diberi oleh pendakwaan untuk menyangkal dakwaan tertuduh bahawa beliau telah dipukul oleh polis semasa berada di dalam tahanan. Walaupun yang arif hakim telah dengan betulnya menyatakan bahawa pendakwaan perlu membuktikan di luar keraguan munasabah bahawa kenyataan beramaran tersebut dibuat dengan sukarela, adalah suatu *g* kesilapan undang-undang untuk mengatakan bahawa pembelaan hendaklah membuktikan dakwaan dipukul atas imbangan kebarangkalian. Adalah juga suatu kesilapan undang-undang untuk mengatakan bahawa beban atas pendakwaan hanyalah untuk menyangkal dakwaan yang dibangkitkan oleh pembelaan. Untuk melangsaikan beban undang-undang yang dipikulnya, *h* pendakwaan haruslah memanggil saksi-saksi untuk memberi keterangan berkaitan hal-hal yang berlaku dari masa tertuduh ditangkap sehinggalah ke masa dia memberi kenyataan beramarannya. Kegagalan berbuat demikian akan hanya bermakna bahawa pendakwaan tidak melangsaikan

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sepenuhnya beban undang-undang yang dipikul olehnya. Oleh yang demikian, kenyataan beramaran yang diberi oleh tertuduh tidak boleh diterima oleh kerana tiada keterangan mengenai kata-kata sebenar amaran yang diberi dan kerana pendakwaan gagal memanggil saksi-saksi material bagi membuktikan bahawa kenyataan tersebut dibuat dengan sukarela.

[3] Perlindungan terhadap penyalahan diri boleh menjadi terbatal oleh statut sama ada secara langsung ataupun zahir. Objek kaedah sukarela dalam s. 24 AK adalah untuk memelihara perlindungan ini. Bagaimanapun, terdapat banyak autoriti-autoriti yang menunjukkan bahawa s. 27 AK berdiri secara bebas tanpa tertakluk kepada kaedah sukarela di dalam s. 24 AK. Oleh yang demikian, perlindungan terhadap penyalahan diri yang terpakai kepada suatu kenyataan paksa atau kenyataan yang bertentangan dengan s. 112 Kanun Prosedur Jenayah hendaklah secara zahirnya dianggap sebagai telah terbatal dengan mengambil kira peruntukan s. 27 AK. Akibatnya, apa yang tinggal untuk dipertimbang adalah sama ada Mahkamah Tinggi, dalam pelaksanaan budi bicaranya, harus mengenepikan maklumat yang diberi oleh tertuduh di bawah s. 27 AK. Beban bukti atas hal ini adalah terletak pada pembelaan. Pegawai polis kepada siapa maklumat tersebut diberi telah tidak di soal balas berkaitan isu ini apabila beliau memberi keterangan. Oleh yang demikian, keterangan tertuduh bahawa beliau tidak memberikan maklumat tersebut mempunyai nilai yang kecil, berakibat tidak wujud bahan-bahan yang mencukupi di hadapan mahkamah untuk melaksanakan budi bicara dengan cara yang berpihak kepada tertuduh.

[4] Tertuduh memberikan maklumat dua kali kepada polis berkenaan penanaman kepala mangsa. Oleh kerana maklumat yang diberikan di bawah s. 27 AK tidak spesifik, ianya tidak boleh diterima masuk bersekali dengan P46A yang berkaitan dengannya. Ini bagaimanapun tidak menjejaskan kebolehterimaan kenyataan kedua atas perkara yang sama.

[5] PW4 tidak melakukan jenayah terbabit dan tidak juga membantu tertuduh dalam melakukannya. Oleh kerana beliau membantu tertuduh dalam menyembunyikan jenayah, beliau jelas merupakan seorang peserta selepas fakta. Di atas fakta, PW4 memainkan peranan yang aktif dalam kapasitinya sebagai peserta selepas fakta. Keterangan beliau dengan itu harus disokong. Keterangan mengenai sokongan pula mestilah keterangan bebas yang boleh menjejaskan tertuduh dengan cara menghubungkannya dengan jenayah. Sokongan tidaklah perlu dalam bentuk keterangan terus bahawa tertuduh melakukan jenayah tersebut; memadai jika ia merupakan keterangan ikut keadaan mengenai hubungannya dengan jenayah. Terdapat keterangan yang mencukupi untuk menyokong keterangan PW4 bukan sahaja bahawa

jenayah telah dilakukan tetapi juga bahawa ianya dilakukan oleh tertuduh. Keterangan PW4 dengan itu boleh digunakan bagi membuktikan kes terhadap tertuduh.

[6] Yang arif hakim telah dengan betulnya menolak pembelaan mabuk apabila mendapati tiada keterangan saintifik untuk menyokongnya dan setelah mempertimbang kelakuan tertuduh sama ada sebelum perlakuan jenayah mahupun selepasnya. Harus diperhatikan bahawa dalam pembelaan mabuk apa yang menjadi isu adalah halkeadaan fikiran orang yang terlibat bagi mempastikan sama ada beliau boleh membentuk niat yang diperlukan. Keterangan terbaik untuk membuktikan keadaan fikirannya adalah kelakuannya sebelum, semasa dan selepas perlakuan jenayah, kerana orang-orang yang berbeza akan memberi reaksi yang berbeza walaupun kepada paras alkohol yang sama. Keterangan saintifik memang penting untuk menerangkan kelakuan seseorang, tetapi ketiadaanya tidaklah sampai memudaratkan.

Case(s) referred to:

Aziz Muhammad Din v. PP [1996] 5 MLJ 473 ***(refd)***
Chandrasekaran & Ors v. PP [1971] 1 MLJ 153 ***(refd)***
Chong Soon Koy v. PP [1977] 2 MLJ 78 ***(refd)***
Davies v. Director of Public Prosecutions [1954] 1 All ER 507 ***(refd)***
Director or Public Prosecution v. Hester [1973] AC 296 ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Harcharan Singh & Anor v. PP [2005] 1 CLJ 11 CA ***(refd)***
Island and Peninsular Development Bhd & Anor v. Legal Adviser, Kedah & Ors [1973] 2 MLJ 71 ***(refd)***
Juraimi Husin v. PP [1998] 2 CLJ 383 CA ***(refd)***
Lee Kok Eng v. PP [1976] 2 MLJ 125 ***(refd)***
Md Desa Hashim v. PP [1995] 4 CLJ 677 FC ***(refd)***
PP v. Hashim Hanafi [2002] 4 MLJ 176 ***(refd)***
PP v. Kalaiselvan [2001] 2 MLJ 157 ***(refd)***
PP v. Mohd Farid Mohd Sukis & Anor [2002] 3 MLJ 401 ***(refd)***
PP v. Ramasamy Sebastian [1991] 1 MLJ 75 ***(refd)***
R v. Lockhart [1785] 1 Leach 386 ***(refd)***
R v. Warickshall [1783] 1 Leach CC 263 ***(refd)***
Wai Chan Leong v. PP [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171 SC ***(refd)***
Yap Ee Kong & Anor v. PP [1981] 1 MLJ 144 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 27, 112(2), (3), (4), 113(1)(a)(ii)
Dangerous Drugs Act 1952, ss. 24, 37A, 113
Evidence Act 1950, ss. 24, 27, 157
National Land Code, s. 380(1)(a)
Penal Code, s. 302

Other source(s) referred to:
Aiyar, *Judicial Dictionary*, 11th edn
Bindra, *Interpretation of Statutes*, 7th edn, p 1113
McNicol, *Law of Privilege*, pp 257, 288
Sarkar on Evidence, 15th edn reprint, vol 2, p 2099
Webster's New World Dictionary, 3rd edn
Woodroffe & Amir Ali, *Law of Evidence*, 16th edn, vol 4, pp 3434, 3435

For the appellant - Karpal Singh; M/s Karpal Singh
For the respondent - Abdul Wahab Mohamed DPP

[Appeal from High Court, Temerloh; Criminal Trial No: 45-3-1995]

Reported by Usha Thiagarajah

JUDGMENT

Augustine Paul JCA:
The accused was charged with an offence of murder under s. 302 of the Penal Code in the High Court at Temerloh. He was found guilty. Upon his conviction the mandatory death penalty was imposed. His appeal against the conviction and sentence was dismissed by the Court of Appeal. He has now appealed to this court.

The deceased, Ali Ahmmed bin Mohammed Ullah, was known to the accused and one Meganathan a/l Mariapen (PW4), the principal witness for the prosecution. The investigation in this case commenced with the discovery of the headless body of the deceased in Ladang Kim Swee Leong by Gopal a/l Ammaswasai (PW3) on 23 August 1994. PW4 said that about three to four weeks prior to the incident the accused had told him that in order to win in the four-digit lottery the head of a person was necessary. On the evening of 19 August 1994 PW4 was driving his car with the accused and the deceased as passengers towards Kampung Awah. On the way the accused bought a bottle of samsu and two cans of beer. The accused and the deceased who were at the backseat were consuming the alcohol. On the way they stopped at the house of the accused's mother where the deceased continued drinking. They left the house at about 9pm. After having travelled for a while the accused asked PW4 to stop the car as he wanted to finish his drink. He then asked

PW4 to drive into an oil palm estate by the side of the road in order to avoid being caught drinking by the police. The car stopped at a spot which was not visible from the main road. The three of them got down from the car. PW4 sat on the bonnet of the car and was eating peanuts. The accused and the deceased were drinking at the rear of the car. PW4 then heard the voice of the deceased and the sound of someone being hit. He went to the rear of the car and saw the accused hitting the deceased on the neck with a rattan cane twice. As PW4 said in his cross-examination:

> Semasa saya nampak OKT pukul simati di leher saya rasa takut. Semasa menunggu OKT balik ke kereta selepas mengheret simati saya merasa takut. Saya tidak lari walaupun takut. Saya takut kalau lari mungkin kena pukul oleh OKT.

The deceased then fell down and the accused, carrying a parang with him, dragged him away. The accused then returned and told PW4 that he had lost the parang. He asked PW4 to drive him to a temple nearby to get another parang which they did. PW4 was still frightened. They then returned to the place where the deceased's body had been left. The accused asked PW4 to remain in the car and went to the place where the body of the deceased was lying. PW4 heard the sound of hacking. He was frightened. Soon after that the accused returned to the car with a bundle together with the parang, the rattan cane and the shirt and trousers of the deceased. He placed them in the boot of the car. They then continued with their journey with two stops on the way. The first stop was somewhere along Jalan Maran where the accused threw the parang, the rattan cane and the shirt and trousers into a swamp by the side of the road. At the next stop the accused took out the bundle which was in a black plastic container and concealed it under some oil palm fronds. They then went back home and slept. On 20 August 1994 PW4 saw the accused with a cangkul. As he said in his evidence:

> OKT ada mengatakan ia telah tanamkan kepala simati. Saya beritahu OKT saya merasa takut. Ia beritahu saya jangan beritahu sesiapa termasuk polis. Beliau kata semua perkara ini dilakukan oleh beliau. Saya jangan risau. Jika ditangkap beliaulah yang bertanggungjawab.

With regard to his knowledge of the intention of the accused in killing the deceased PW4 said in his cross-examination:

> Pada 19.4.94 pada atau sebelum simati menumpang kereta saya OKT tidak ada mengatakan ia ada niat untuk membunuh simati. Pada bila-bila masa pun OKT tidak ada mengatakan ia ada niat untuk membunuh simati.

On 23 or 24 August 1994 PW4 gave a statement to the police. On 26 August 1994 he and the accused were arrested. In the course of the investigation the accused supplied certain information to the police which led to the discovery of some exhibits in this case. He told ASP Mohd Sabri bin Muhammad (PW17) "Tanam kepala Ali di kebun kelapa sawit Charuk Puting". PW17 recorded this statement on a piece of paper. It was signed by him and the accused. It was marked as exh. P46A without any objection from the defence. Later the accused led PW17 and a police party to a spot along Jalan Maran. There the accused told PW17, "Disinilah saya buang itu parang, rotan dan seluar Ali". The rattan cane and the trousers were recovered. At another spot the accused told PW17, "Sinilah tempat saya tanam kepala Ali". The head was found there. At a little distance away the accused told PW17, "Sinilah tempat buang plastik isi kepala Ali". A black plastic container was found there. PW17 recorded the three statements made in a police report. It was admitted without any objection from the defence and marked as exhs. P50A, P50B and P50C. As a matter of fact learned counsel expressly said:

> Tiada bantahan bagi maklumat-maklumat ini dikemukakan.

On 27 August 1994 the accused led Chief Inspector Mohammad Jamel bin Mat Nor (PW14) to a spot and said, "Sinilah saya buang itu parang". A parang was found there. PW14 recorded the information supplied in a police report. It was marked as exh. P45 without any objection from the defence. On 30 August 1994 the accused gave a cautioned statement to the police. It was admitted in evidence by the High Court after holding a trial within a trial. Its contents are substantially similar to the evidence of PW4.

Learned counsel for the accused advanced several arguments before us in support of the appeal. They relate to:

(a) the admissibility of the cautioned statement of the accused,

(b) the admissibility of the information supplied by the accused under s. 27 of the Evidence Act 1950 ("s. 27")

(c) the evidentiary value of the testimony of PW4

(d) the standard of proof applied by the learned High Court Judge ("the learned judge") at the end of the case

We will now consider the issues raised by learned counsel.

(a) The Admissibility Of The Cautioned Statement Of The Accused

Learned counsel raised two objections on this issue. Firstly, he contended that before a cautioned statement is admitted there must be evidence of the words of the caution that was administered and that it is not sufficient merely to state that it had been read. Secondly, with regard to the question of the voluntariness of the cautioned statement learned counsel said that the learned judge was wrong in saying that the accused must adduce evidence on his allegation of being assaulted after his arrest on the balance of probabilities thereby placing a burden on the accused. Accordingly, he said, the cautioned statement must be ruled as being inadmissible. In reply the learned Deputy Public Prosecutor said that the actual words of the caution that was administered are as stated in the cautioned statement itself. He added that no evidence was adduced by the prosecution as to what had happened from the time the accused was arrested on 26 August 1994 till the recording of the cautioned statement on 30 August 1994 as there was no cross-examination on this issue. The submission advanced raises two matters for consideration. They are:

(i) Whether there must be evidence of the actual words of the caution that was administered

(ii) Manner of proving voluntariness

(i) Whether There Must Be Evidence Of The Actual Words Of The Caution That Was Administered

The evidence of the recording officer in respect of the caution that he administered is as follows:

> Kemudian saya mulakan rakaman percakapan dengan membacakan amaran di bawah seksyen 113 KAJ yang diterangkan dan ditunjukkan kepada OKT melalui L/Kpl Chandra Sekaran.

It is first necessary to set out the relevant part of s. 113 of the Criminal Procedure Code ("s. 113") which deals with the caution. It reads as follows:

> (1) …
>
> Provided that:
>
> (a) no such statement shall be admissible or used as aforesaid:
>
> (i) …

(ii) in the case of a statement made by the person after his arrest, unless the Court is satisfied that a caution was administered to him in the following words or words to the like effect:

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

It must be observed that the need to administer the caution as required by s. 113(1)(a)(ii) is an explicit endorsement and preservation of the privilege against self-incrimination as it gives the accused the option to remain silent. It is perhaps to ensure that this privilege is not diluted in any way that s. 113(1)(a)(ii) provides that a statement made by a person after his arrest shall not be admissible in evidence "… unless the court is satisfied that a caution was administered to him in the following words or words to the like effect …." It can therefore be seen that the satisfaction of the court on the administration of the caution goes to the very root of the admissibility of a statement that had been made. What requires consideration is whether a mere reading of the caution will amount to the court being "satisfied" that it had been administered. The word "satisfied" has been understood to mean, free from anxiety, doubt, perplexity, suspense or uncertainty (*Aiyar's Judicial Dictionary*, 11th edn). *Webster's New World Dictionary*, 3rd edn defines the word "satisfy" as:

> to fulfill or answer the requirements or conditions of (something); to comply with (rules, standards, or obligations); to be free from doubt or anxiety, convince.

Bindra's *Interpretation of Statutes*, 7th edn says at p. 1113:

> 'Satisfied' should be read as meaning 'reasonably satisfied'. It cannot import an arbitrary or irrational state of being satisfied. Satisfaction must be honest, careful and deliberate, arrived after exercising due care and caution (*In re V Venkataramas* AIR [1949] Mad 529; *Liversidge v. Anderson* [1942] AC 206, 271; *Ratam Roy v. State of Bihar* AIR [1950] Pat 332, 345). The question of satisfaction is, however, a question of fact and it is a subjective consideration and not an objective consideration (*In re Jayantilal* AIR [1949] Bom 319, 333 (FB)).

Thus as Syed Agil Barakbah J (as he then was) said in *Island and Peninsular Development Bhd & Anor v. Legal Adviser, Kedah & Ors* [1973] 2 MLJ 71 in construing the word "satisfied" in s. 380(1)(a) of the National Land Code at p. 72:

> The word 'satisfy' means to furnish with adequate proof or to convince. Construing it in its ordinary and natural meaning, the duty lies with the applicants to satisfy the registrar by furnishing him with adequate proof that the registered documents of title have been registered in the wrong names.

It follows that in the passage just referred to a bare statement by the applicants that the registered documents of title have been registered in the wrong names is not sufficient. The registrar will be "satisfied" only if he is convinced of the allegation by adequate proof that has been furnished to him by the applicants in order to avoid a satisfaction which is arbitrary or irrational.

The logical corollary is that evidence that the caution under s. 113 was merely read will deprive the court of the opportunity to exercise its discretion in order to determine whether the caution that was administered is as prescribed or to the like effect. It will amount to the court accepting the conclusion of the witness that the prescribed caution had been administered when the conclusion is one that must be arrived at by the court itself based on evidence that has been adduced. The court can be "satisfied" that the caution was administered as required only with adequate proof of the words used. This can only be done if there has been evidence of the actual words used by the recording officer. In that event the court would be in a position to determine whether the caution that was administered is as prescribed or to the like effect or is something that is different. Oral evidence of the words used is particularly significant in this case as it is subject to appellate review. There is no such oral evidence though the words used appear in the cautioned statement. The resultant matter for consideration is whether the cautioned statement can be used as evidence of the words of the caution that was administered. The relevant part of the cautioned statement reads as follows:

> Sebelum saya merakamkan percakapan tertuduh ini, terlebih dahulu saya memberi amaran kepada beliau mengikut sek 113 KAJ seperti berikut 'Adalah menjadi kewajipan saya untuk memberi amaran kepada kamu bahawa kamu tidaklah diwajibkan menyatakan sesuatu atau menjawab apa-apa soalan tetapi apa apa jua yang kamu nyatakan sama ada sebagai menjawab sesuatu soalan atau tidak, boleh diberi sebagai keterangan'.

The contents of a cautioned statement are substantive evidence of whatever the accused had said. As the passage just reproduced is a statement of the recording officer it is not substantive evidence. It can only be used to corroborate his evidence under s. 157 of the Evidence Act 1950. Corroborative evidence is only admissible to support testimony that has already been given. It is not admissible to supplement such testimony. In *Yap Ee Kong & Anor v. PP* [1981] 1 MLJ 144 this court adopted Director or *Public Prosecution v. Hester* [1973] AC 296 where it was held that the purpose of corroboration is

not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible. It was further held that if the evidence to be corroborated is found to be uninspiring and unacceptable then corroboration would be futile and unnecessary. It follows that in the absence of any evidence by the recording officer of the actual words of the caution that was administered evidence of such words in the cautioned statement cannot be used to supplement the deficient evidence. In any event he did not say that the caution that he read is as recorded in the cautioned statement.

The result is that there is no evidence before the court in order to be "satisfied" whether the caution that was administered is as prescribed or contain words to the like effect.

(ii) Manner Of Proving Voluntariness

It will be recalled that the accused was arrested on 26 August 1994 and the cautioned statement was recorded from him on 30 August 2004. In the trial within a trial the accused said that he had been assaulted by the police during the period when he was in remand. No evidence was adduced by the prosecution to negate this allegation during the period referred to. The learned Deputy Public Prosecutor said that as there was no cross-examination on this issue no such evidence was adduced. The learned judge in admitting the cautioned statement said:

> With regard to the accused's assertion that he was assaulted while under remand, I have this to say while the prosecution is under obligation to prove beyond reasonable doubt that 1/D 43 was given by the accused free of any kind of coercion inducement or promise. The defence in asserting that the accused was assaulted, must come up with some form of evidence to show on the balance of probabilities that what was alleged could have occurred. This, the defence did not do. The assertion remains just a bare allegation.

While it has been correctly recognised by the learned judge that the prosecution must prove beyond reasonable doubt that a cautioned statement was given voluntarily it is an error of law to say that the defence must prove an allegation of assault on a balance of probabilities. In *Juraimi bin Husin v. PP* [1998] 2 CLJ 383 it was held that the only burden that rests upon an accused is to place before the judge such facts as raise a well-grounded suspicion that the statement was made involuntarily. This is only an evidential burden (see *Aziz bin Muhammad Din v. PP* [1996] 5 MLJ 473). It is also an error of law to suggest that the burden on the prosecution is only to negate allegations that have been raised by the defence. In order to discharge the legal burden that

it carries the prosecution must call its material witnesses in the course of its case to establish that the cautioned statement was given voluntarily. In this regard it is pertinent to refer to the judgment of the High Court in *PP v. Kalaiselvan* [2001] 2 MLJ 157 at pp. 171-172:

> The general rule is that the prosecution must adduce sufficient evidence of the facts to show that a cautioned statement was obtained voluntarily in order to discharge the legal burden that it bears. In *Boudreau v. The King* [1949] 94 CCC 1 it was held that all the surrounding circumstances must be investigated and, if upon their review the court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Thus all persons who had anything to do with the accused during the period before the statement was made must be called as witnesses. Accordingly, as Dickson J said in *Erven v. The Queen* [1979] 92 DLR (3d) 507 at p. 519 the witnesses who should normally be called would be:
>
> > … the police officer to whom the statement was made or given, and any other police officers who might have been in a position to threaten or to offer hope of advantage to the accused. These witnesses testify affirmatively to statements made and to the absence of threat or promise.
>
> Thus the Singapore High Court in *PP v. Tan Boon Tat* [1990] 2 MLJ 466 examined at p 471:
>
> > … the evidence of the events that occurred between the time of the arrest of the accused and the time when the statement was recorded to see whether any inducement, threat or promise was made to the accused which caused him to make the statement which was made.

Similarly in *Lim Sing Hiaw v. PP* [1965] 1 MLJ 85 the Federal Court took exception to the fact that (at p. 89):

> … no attempt was made to call any police or army officer who could say what happened to the appellant during the three days he was in custody prior to making his statement to Inspector Lingam.

Where a witness is considered material in order to establish the voluntariness of the statement the failure to call him is fatal. In this regard Duff CJC in speaking for the Supreme Court of Canada in *Thiffault v. The King* [1933] 60 CCC 97 said at p 103:

> Where such a statement is elicited in the presence of several officers the statement ought, as a rule, not to be admitted unless (in the absence of some adequate explanation of their absence) those who were present are produced by the Crown as witnesses … and, where the statement

> professes to give the substance of a report of oral answers (given to questions) … ought not to be admitted … unless the person who is responsible for its compilation is (here again in the absence of some adequate explanation of his absence) called as a witness.

Where an important witness is not available to give evidence his absence must be adequately explained. In commenting on what is an adequate explanation PK McWilliams in his book *Canadian Criminal Evidence* (1988) (3rd Ed) says at paras 15-80:

> If it means that the witness was only incidentally involved with the accused that may be reasonable, but if it is simply that the witness is, for example, away moose hunting, then it is not. In *R v. Botfield* [1973] 28 CCC (2d) 472 (BCCA) the fact that a store detective was ill in hospital was rejected as being an inadequate explanation.

I must add that even though the absence of a material witness has been adequately explained thereby precluding an adverse inference from being drawn against the prosecution, yet the failure to produce the witness to testify may result in the prosecution not being able to discharge its burden if the testimony of that witness is essential for the unfolding of its case. A case cannot be said to have been proved simply by explaining away the absence of a witness whose evidence is crucial. Be that as it may, there is no burden upon the prosecution to call everyone who had contact with the accused however peripheral or insignificant his role (see *R v. Haughton (No 2)* [1982] 38 OR (2d) 496. Thus in *R v. Settee* [1974] 22 CCC (2d) 193 (Sask CA) it was held that it was not necessary to call witnesses who had escorted the prisoner and did not take part in the interrogation.

And at p. 173:

> The prosecution must therefore call its material witnesses in the course of its case as I explained earlier. The argument advanced by the learned deputy public prosecutor is also contrary to the principles governing the calling of evidence in rebuttal which is allowed only in very special or exceptional circumstances (see *PP v. Chia Leong Foo* [2000] 6 MLJ 705). The duty of the prosecution is to present completely the evidence upon which it relies to discharge its burden in the course of its case and not split its case by reserving some evidence to be called in rebuttal.

And further at p. 174:

> The prosecution cannot therefore call evidence to rebut matters that could have been foreseen or if such evidence was itself relevant to prove its case. Where, however, the accused in his evidence makes allegations against persons considered by the prosecution to be not material in establishing the voluntariness of the statement by virtue of them being of marginal, minimal or doubtful

> relevance they may be called to give evidence in rebuttal. In *Tan Too Kia v. PP* [1980] 2 MLJ 187 where the Federal Court commented on the failure by the prosecution to call evidence in rebuttal against whom the accused had made allegations must therefore be understood in that light. The prosecution cannot therefore withhold material evidence in its possession for the purpose of rebutting allegations raised by the accused.

It is therefore clear that the duty of the prosecution is to present completely the evidence upon which it relies to discharge its burden in the course of its case and not split its case by reserving some evidence to be called in rebuttal. The prosecution cannot therefore withhold material evidence in its possession for the purpose of rebutting allegations raised by the accused. Thus the prosecution ought to have called witnesses to testify on matters that transpired from the time of arrest of the accused till he gave the cautioned statement as it is relevant. Failure to do so only means that the prosecution has not fully discharged the legal burden that it has to satisfy.

In the circumstances it is our view that the cautioned statement made by the accused is not admissible as there is no evidence of the actual words of the caution that was administered and as the prosecution has failed to call material witnesses to establish that the statement was made voluntarily.

(b) The Admissibility Of The Information Supplied By The Accused Under s. 27

Learned counsel conceded that no objection was taken during the trial to the admissibility of the information supplied by the accused to the police under s. 27. However, he said that notwithstanding the fact that they were admitted without objection by the defence the fact remains that the information supplied is involuntary and on the authority of *Md Desa bin Hashim v. PP* [1995] 4 CLJ 677 and *Goi Ching Ang v. PP* [1999] 1 CLJ 829 they are inadmissible; and inadmissible evidence remains inadmissible. He added that in order for evidence to be admissible under s. 27 there must also be compliance with s. 112(2), (3) and (4) of the Criminal Procedure Code ("s. 112") which read as follows:

> (2) Such person shall be bound to answer all questions relating to such case put to him by that officer:
>
> Provided that such person may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

(3) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.

(4) A police officer examining a person under subsection (1) shall first inform that person of the provisions of subsections (2) and (3).

In support he referred to *Goi Ching Ang v. PP* [1999] 1 CLJ 829 where Chong Siew Fai CJ (Sabah and Sarawak) said at p. 855:

> Moreover, admitting the appellant's s. 27 information would infringe the principle of the right against self-incrimination, there being no evidence of s. 112(ii), (iii) and (iv) of the Criminal Procedure Code having been complied with.
>
> In short, since the learned trial judge in the instant case under appeal had found that the s. 27 information of the appellant was not voluntarily made, it is irrelevant. It was not the appellant's own statement and was extracted from him in contravention of the privilege against self-incrimination and would be unfair to have it admitted against him. The facts and circumstances of the case show that the s. 27 information obtained has an adverse effect on the fairness of the proceedings so that the learned trial judge ought not to have admitted it.

Learned counsel's objection is thus centred on the need for the requirements of the privilege against self-incrimination being complied with in order to render admissible information supplied under s. 27.

It must be observed that the privilege against self-incrimination can be expressly or impliedly abrogated by statute. In commenting on the implied abrogation of the privilege the *Law of Privilege* by McNicol says at p. 257:

> More and more often it will be seen that the courts seem to be finding that the very object of the statute would be frustrated if the privilege were to apply (*Police Service Board v. Morris* [1985] 58 ALR 1; *Stergis v. Federal Commissioner of Taxation* [1989] 89 ATC 4442 at 4455-7; *Commissioners of Customs and Excise v. Ingram* [1948] 1 All ER 927 at 929). This is not to deny that the very object of the statute would not be frustrated. Rather it is simply worth noting that the frustration of statutes appears to have become the yardstick for determining whether there is a clear manifestation of a legislative intention to abrogate the privilege by necessary implication.

There are various ways in which the privilege against self-incrimination is preserved by law. They include, *inter alia*, the right of a person not to answer any questions as provided by s. 112(2), the need for the administration of the caution under s. 113 and the entrenched rationale of the voluntariness rule as

contained in s. 24 of the Evidence Act 1950 ("s. 24"). In commenting on the relationship between the latter rule and the privilege against self-incrimination the *Law of Privilege* by McNicol says at p. 288:

> It is argued elsewhere by the present author that the privilege against self-incrimination is the most appropriate explanation of the voluntariness rule. In brief, it is argued that the 'pressure' or 'compulsion' aspect of the privilege against self-incrimination is closely allied to the 'inducement' or 'oppression' required for the voluntariness test. When a court asks whether a confession is voluntary, it is asking whether there has been any pressure on the accused to incriminate her or himself. If a court holds a confession 'involuntary' it is stating that there has been either an inducement or oppressive conduct (or force) which caused the accused to confess. In other words, there has been sufficient pressure or compulsion for the privilege against self-incrimination to have been breached.

The object of the voluntariness rule in s. 24 is therefore to preserve the privilege. The resultant critical issue for determination is whether this privilege also extends to s. 27. If this privilege is to be read as a part of s. 27 the information supplied under the section must, in the first place, be also subject to the voluntariness rule in s. 24. If it is not so subjected s. 27 will not be governed by the privilege. It has been established by a long line of authorities that s. 27 is independent and is not subject to the voluntariness rule in s. 24. See, for example, *Lee Kok Eng v. PP* [1976] 2 MLJ 125; *Chong Soon Koy v. PP* [1977] 2 MLJ 78; *Chandrasekaran & Ors v. PP* [1971] 1 MLJ 153 and *Wai Chan Leong v. PP* [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171. Then came *Md Desa bin Hashim v. PP* [1995] 4 CLJ 677 where it was ruled that in order for information supplied under s. 27 to be admissible it must be voluntary. The law was re-instated to its rightful position in *Goi Ching Ang v. PP* [1999] 1 CLJ 829. In our opinion it is illogical to suggest that s. 27 is subject to the voluntariness rule in s. 24. If that were to be so the desired evidence can be admitted under s. 24 without there being any need for s. 27. The fact that s. 27 has been specifically enacted is therefore a clear indication that it has a purpose of its own to serve. As it applies only to a restricted and specified type of evidence as opposed to s. 24 it can only mean that it is an independent provision which is unaffected by s. 24, or, for that matter, any other statutory provision regulating the manner of taking or recording statements from any person. This is illustrated by the established rule that information relating to facts discovered in consequence of a confession rendered inadmissible by reason of being involuntary is still admissible under s. 27 (see *R v. Warickshall* [1783] 1 Leach C C 263; *R v. Lockhart* [1785] 1 Leach 386). Thus the existence of s. 27 on its own without being affected by s. 24, s. 113 and s. 37A of the Dangerous Drugs Act 1952 was correctly recognised by this court in *Wai Chan Leong v. PP* [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171. That would also be the inevitable result of the relationship

between s. 112 and s. 27. The corollary is that s. 27 is not subject to the voluntariness rule or any other prescribed mode of recording statements. Even the passage from *Goi Ching Ang v. PP* [1999] 1 CLJ 829 referred to by learned counsel does not support the stand taken by him. This court referred to s. 112 in that case not as a condition of admissibility of information under s. 27 but as a ground for excluding such evidence in the exercise of the discretion of the court. Both are different concepts. Since voluntariness is not a condition of admissibility of information supplied under s. 27 the privilege against self-incrimination which is manifested in an involuntary statement or in a statement made in breach of the requirements of s. 112 must be deemed to have been impliedly abrogated insofar as s. 27 is concerned. It follows that the argument of learned counsel that s. 27 is subject to the voluntariness rule in s. 24 and the privilege against self-incrimination in s. 112 cannot be sustained.

We agree with *Goi Ching Ang v. PP* [1999] 1 CLJ 829 that information supplied under s. 27 which has been found to be involuntary may be excluded by the Court in the exercise of its discretion. As the exclusion of the evidence is discretionary the exercise of the discretion depends on the facts of each case. This was explained by the High Court in *PP v. Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401 at pp. 413-415:

> In making a ruling on the evidence adduced by both parties, it is first necessary to determine whether *Goi Ching Ang v. PP*, where a s. 27 statement was excluded on the ground that it was involuntarily supplied, must be taken to mean that such statements must be excluded in all cases of involuntariness. In resolving the problem that I have posed, it must be remembered that the exclusion of evidence in the circumstances now under deliberation is a matter of discretion. The exercise of a discretion cannot be fettered by laying down rules and regulations. If that is so, it will become a rule of law and cease to be an exercise of discretion. This has been stressed in a plethora of local cases. I consider it sufficient to refer to *PP v. Sundaravelu* [1967] 1 MLJ 79 where Raja Azlan Shah J (as His Highness then was) said at pp 79-80:
>
> > This application brings into review the provisions of s. 310 of the Criminal Procedure Code (Cap 6). It is clear from the provisions of that section that this court has a discretion whether or not to allow the application, but to my mind, emphasis is laid on the phrase "in order that substantial justice may be done in the matter". I think the provisions of this section have been well gone into by the Court of Appeal in *Veerasingam*'s case [1958] MLJ 76. There it was said that the section is one of discretion and no hard and fast rules can be laid down, otherwise it ceases to be a discretion and becomes a rule of law.

As I said in *Liow Tow Thong & Ors v. Pentadbir Tanah Alor Gajah & Ors* [1998] 1 MLJ 79 at p 86:

> It is a principle of long standing that a body charged with exercising discretion in the making of decisions must not, by its own act or decision, prevent itself from exercising that discretion properly (see *R v. Sevenoaks DC, exp Terry* [1985] 3 All ER 226).

Evidence cannot therefore be excluded in the exercise of the court's discretion by the automatic application of a predetermined set of rules. In so saying, I find support in *R v. Chalkley and Another Appeal* [1998] 2 All ER 155 where Auld LJ, in dealing with the admissibility of evidence under s. 78 of the Police and Criminal Evidence Act 1984 on the ground of unfairness, said at pp 177-178:

> We also say here, though it is strictly more relevant to Mr Cassel's submission about the balancing exercise undertaken by the judge, that we reject as contrary to the wording of s 78 and the authorities that any conduct which may be typified as "oppressive" automatically requires exclusion of evidence obtained thereby. Just as the labelling of conduct as unlawful does not necessarily affect its character for the purpose, nor does the application to it of the epithet "oppressive" automatically override the fundamental test of fairness in admission of evidence. Oppressive conduct, depending on its degree and/or its actual or possible effect, may or may not affect the fairness of admitting particular evidence.

In this regard, I also refer to *McDermott v. The King* [1948] 76 CLR 501 where Dixon J said at p. 513:

> In referring the decision of the question whether a confessional statement should be rejected at the discretion of the judge, all that seems to be intended is that he should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused.

In commenting on limits that may be set in the exercise of the discretion to exclude evidence Latham CJ, Mc Tierman, Webb and Fullagar JJ said in *R v. Lee* [1950] 82 CLR 133 at p 151:

> What is impropriety in police methods and what would be unfairness in admitting in evidence against an accused person a statement obtained by improper methods must depend upon the circumstances of each particular case, and no attempt should be made to define and thereby to limit the extent or the application of these conceptions.

It follows that *Goi Ching Ang v. PP* cannot be understood to mean that a s. 27 statement must be excluded in all instances where it was supplied involuntarily. Neither does that case profess to lay down such a rule. It was made clear by the Federal Court that it was considering the exclusion of the s. 27 statement 'On the fact of this case …' (at p. 524) and as stated at p. 527:

> … The facts and circumstances of the case show that the s. 27 information obtained has an adverse effect on the fairness of the proceedings so that the learned trial judge ought not to have admitted it.

Therefore, the Federal Court excluded the s. 27 statement on the facts of that case. The rule is therefore not of universal application. It depends on the facts of each case. Thus the ratio that can be gleaned from *Goi Ching Ang v. PP* is that a court, in considering the exclusion of a s. 27 statement on the ground of involuntariness, must take into account the facts of the case and the degree of force used. In my opinion, the degree of involuntariness that can be said to be sufficient to exclude a s. 27 statement in the exercise of the discretion of the court must be balanced against the fact that involuntariness is not a condition of admissibility of such a statement. Therefore the circumstances of involuntariness must indeed be extraordinary in order to exclude a statement on a ground which, in the first place, does not affect its admissibility in law. In this case, the defence's evidence is that the first accused supplied the information after the police had agreed not to take any action against the second accused and his wife. If the first accused had the coolness and the freedom of mind to negotiate with the police before supplying the information, I am of the view that the force used was not severe enough to warrant the exclusion of the information. In the circumstances, I declined to exercise my discretion to exclude the information supplied by the first accused.

The party that is seeking to have evidence excluded in the exercise of the discretion of the court has the onus of showing, on the balance of probabilities, that the discretion should be exercised in its favour. In this regard reference may be made again to the judgment of the High Court in *PP v. Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401 at pp 412-413:

> The Australian courts have held that the party seeking to have evidence ruled inadmissible in the exercise of the discretion of the court has the onus of showing, on the balance of probabilities, that the discretion should be exercised in that way (see *R v. Lee* [1950] 82 CLR 133; *Wendo v. R* [1964] 109 CLR 559; *Cleland v. R* [1982] 151 CLR 1; *Van Der Meer v. R* [1988] 62 ALJR 656). As Kerry Stephens says in his book entitled *Voir Dire Law* at p. 58:
>
> > It follows that the party seeking the exclusion of the evidence must satisfy the court that the circumstances are such that the court should exercise its discretion in favour of the party making the application.

The appropriate way of dealing with an application of this nature is by way of a trial within a trial (see *Smith v. R* [1957] 97 CLR 100; *R v. Bradshaw* [1978] 18 SASR 83; *R v. Rowley* [1986] 23 A Crim R 371). However, in *R v. Dugan* [1984] 2 NSWLR 554, Street CJ expressed the view that a judge, in considering an application of this nature, '… must necessarily act upon such evidence as is placed before him either in the substantive trial or on the voir dire, or both' (at p 559). In my opinion, the holding of a trial within a trial is a more appropriate method to be followed. In support, I refer to Kerry Stephens where he says at p 7:

> … if the voir dire procedure is not adopted, a defendant is placed at a disadvantage because the impugned statement will not be excluded unless evidence arising during the prosecution case warrants that action. When a voir dire is not conducted, an accused is placed in a situation where he or she can only give evidence during the substantive trial. … The result obviously places an accused at a serious disadvantage because had the admissibility of the statement been determined during the prosecution case it may not have been necessary for the defendant to give evidence during the trial proper.

The holding of a trial within a trial for the purpose under discussion will ensure that all relevant matters to facilitate the making of a ruling are addressed. If such a course is not followed, material evidence may be overlooked as the issue will not be in focus. This will place the defence at a disadvantage. Needless to say, the evidence in dispute can be excluded based even on material available in the substantive trial itself on the issue.

What therefore remains for consideration is whether the High Court ought to have excluded the information supplied by the accused under s. 27 in the exercise of its discretion. As stated earlier the burden of proof on this issue is on the defence. The very evidence that is now being objected to was admitted by the High Court without any objection from the defence. The police officer to whom the information was supplied was not cross-examined on this issue when he gave evidence. In the circumstances the evidence of the accused that he did not supply the information in question has very little value with the result that there is insufficient material before the court to exercise the discretion in favour of the accused.

We pause to add that the accused had supplied information to the police twice with regard to the burying of the head. The law relating to the admissibility of such information was considered by the High Court in *PP v. Hashim bin Hanafi* [2002] 4 MLJ 176 at pp. 187-188:

The section provides that '… so much of such information … as relates distinctly to the fact thereby discovered, may be proved'. It follows that the information that is admissible must relate distinctly to the fact discovered. It was made abundantly clear by the Privy Council *Pulukuri Kotayya & Ors* that it is fallacious to treat the 'fact discovered' as equivalent to the object produced; the fact discovered embraces the place from which the object is produced, and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. The discovery must be the direct cause of the information (see *Jaffer Husain Dastagir v. State of Maharashtra* AIR [1970] SC 1934). Thus the information must relate to the place of concealment of the object and the accused's knowledge of it. What is admissible is therefore information supplied by the accused which relates to the exact location of the object and its subsequent discovery. Since the information supplied by the accused must lead to the discovery of the object it means that the discovery must be of some fact which the police had not previously learnt from other sources and the knowledge of the fact should be first derived from information supplied by the accused (see *Thimma v. State of Mysore* AIR [1971] SC 1871; *Joy v. C I of Police* [1989] 1 KLT 443 (Ker). Thus the discovery must be made by virtue of and exclusively as a result of information given by the accused (see *Ramjan Das v. State* [1988] 1 Crimes 843). In this regard Nik Hashim J said in *Public Prosecutor v. Kanapathy a/l Kupusamy* [2001] 5 MLJ 20 at p 28:

> To constitute "information" under the section, the information must come from the accused and nobody else.

If the police have prior knowledge of the information supplied by the accused, obviously the subsequent discovery will be based on such prior knowledge and not on that of the accused. It will thus render the information supplied by the accused inadmissible as it will not be the cause of the discovery. It must be remembered that s. 27 is based on the view that if a fact is actually discovered in consequence of information given some guarantee is afforded thereby that the information is true, and accordingly can be safely allowed to be given in evidence (see *Pulukuri Kotayya & Ors*). It follows that prior knowledge which will make s. 27 inapplicable must be of such a nature that it must be capable on its own of leading to the discovery of the object. If it does not have that effect then the cause of the discovery will still be the information supplied by the accused and not the prior knowledge of the police. In that event, the information supplied by the accused will be admissible as the information that the police have will not amount to prior knowledge. The corollary is that information that the accused has drugs or has hidden the drugs without any further information on their exact location will not amount to prior knowledge. In support, I refer to *Md Desa bin Hashim v. Public Prosecutor* [1995] 3 MLJ 350 where Gopal Sri Ram JCA said at p 360:

> If an investigating agency has prior knowledge of the whereabouts of the article that is recovered, then the section does not apply.
>
> The 'whereabouts' of an article is a reference to its exact place of location. In further support, I refer to the Indian Supreme Court case of *Aber Raja Khima v. State of Saurashtra* AIR [1956] SC 217 where it was held that discovery of hidden incriminating articles said to have been recovered by the accused is inadmissible if the police already knew where they were hidden. As s. 27 has no application where the investigating agency has prior knowledge of the whereabouts of the object that is recovered it follows that where the accused makes more than one statement it is only the first statement that is admissible; the second is not (see *Md Desa bin Hashim*). This is because the second statement is a mere repetition of the first statement of which the police already have knowledge. However, if the first statement of the accused is vague and the precise information is received as a result of a subsequent statement by him, it is the latter that is admissible (see *Vinayak Joshi v. The State* AIR 1968 Pun 120). This is for the obvious reason that the first statement, being not precise, is not the cause of discovery and is therefore not admissible. When the information contained in the statement of the accused does not disclose the exact place where the object was kept concealed by him then even if the object is recovered it cannot be said that it was recovered pursuant to the information furnished by the accused (see *Paramasivan v. State* [1990] Cr LJ 1491; *State v. Ram* Ch AIR [1965] Or 175; *Orissa v. Nursingha* [1990] Cr LJ 1676).

As the first information supplied in this case with regard to the burying of the head under s. 27 is not specific it is inadmissible together with exh. P46A which relates to it. This does not affect the admissibility of the second statement on the same subject matter.

(c) The Evidentiary Value Of The Testimony Of PW4

In concluding that PW4 is an accomplice the learned judge said in his grounds of judgment:

> Putting aside the accused's defence evidence as regards to SP4's role in the commission of the crime for a moment, on the prosecution's own evidence it is manifest that this witness did play substantial role throughout this fatal encounter. He was not a mere by-stander who concurred in the commission of the offence but also an accessory before and after the commission of the criminal act. As such I have no hesitation in holding that SP4 is an accomplice.

The evidence in this case reveals that PW4 had no prior knowledge of the intention of the accused to commit the crime. He first knew of it when he saw the accused hitting the deceased at the rear of the car. Thereafter he assisted the accused actively in concealing the crime. The question that arises is whether on these facts he can be termed as an accomplice. In *Davies v. Director of Public Prosecutions* [1954] 1 All ER 507 it was held that persons

who are particeps criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact, are accomplices. In explaining the role played by these categories of persons the *Law of Evidence* by Woodroffe and Amir Ali, 16th edn, vol 4 says at p. 3434-5:

> A principal of the first degree is one who actually commits the crime; a principal of the second degree is a person who is present and assists in the perpetration of the crime; an accessory before the fact is one who counsels, incites, connives at, encourages or procures the commission of a crime; everyone is an accessory after the fact to a felony who, knowing a felony to have been committed by another, receives, comforts or assists him in order to enable him to escape from punishment; or rescues him from arrest for the felony; or having in custody for the felony, intentionally and voluntarily suffers him to escape; or apposes his apprehension.

PW4 neither committed the crime nor did he assist the accused in committing it. Neither did he procure its commission. As he assisted the accused in concealing the crime he is clearly an accessory after the fact. In commenting on the evidentiary value of the testimony of such a witness the Court of Appeal said in *Harcharan Singh & Anor v. PP* [2005] 1 CLJ 11 at pp 19-20:

> There is some controversy as to whether an accessory after the fact is an accomplice in the strict sense as he is not concerned in the original offence for which the accused has been charged. As *Sarkar on Evidence*, 14th edn, vol 2 says at pp. 1912-1913:
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> In the penal laws of this country ordinarily two classes have been recognised: Persons who are principals (ie, directly or indirectly concerned in the offence) and abettors or instigators (ie, privy to the offence). The term "accomplice" obviously includes principals in the first and second degrees as also abettors. An accessory after the fact is one who knowing a felony to have been committed receives, relieves, comforts, assists, harbours or maintains a felon. In a case it was doubted whether an accessory after the fact is an accomplice (*R v. Chutterdharee*, 5 WR Cr 59: see also *Nga Pauk v. R*, A [1937] R 513) but the Judicial Committee has held that he is (*Mahilikilili v. R*, A [1943] PC 4; 44 Cr LJ 1; *Mahadeo v. R*, A [1936] PC 242: 40 CWN 1164; see *Ismail v. R*, A 1947 L 220). An accessory after the fact being not concerned in the original offence for which the accused is tried, may not in the strict sense come within "accomplice", but even in such cases there are exceptions, eg, the possessor of stolen property soon after theft may be presumed to be the thief (v. ill (a) to s 114) and he is an accomplice in the case against the thief. All accessories after the fact are not of the same degree of criminality, as so much depends on the particular facts of each case. In many cases the question whether an accessory after the fact is or is not an accomplice in law may assume an academic form, the principal point to which consideration is applied being whether corroboration of his evidence is required. Whether an accessory after the fact does or does not come technically within the category of "accomplice",

> he is on the same footing as an accomplice and his evidence is no better. The presumption of untrustworthiness equally attaches to his evidence and on the same principle as that of an accomplice, the sounder rule would be to require corroboration (see *Alimuddin v. R*, 23 C 361 post; *R v. Kalu*, A 1937 O 259; *Shyan Kumar v. R*, A 1941 0130; *Brijpal v. R*, A 1936 O 413; *Turab v. R*, A 1935 0 1; *Sundor Lal v. R*, A 1934 O 315; *Nawab v. R*, A 1923 L 391; *Bahawala v. R*, A 1925 L 432; *Hayatu v. R*, A 1929 L 540; *Ismail v. R*, A 1947 L 220; *Ashutosh v. S*, A 1959 Or 159 and cases post), except when it can be dispensed with in the special circumstances of a case. In such cases the real question is the degree of credit to be attached to the evidence of these witnesses who as accessories are concerned with the accused in some other offence arising out of the original offence.
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> Strictly speaking an accessory after the fact cannot be an accomplice as he is not concerned in the commission of the original offence. In *Kuan Ted Fatt v. PP* [1985] 1 MLJ 211 the Federal Court did not treat a witness who was present at the time of the commission of the offence as an accomplice as he had no prior knowledge that the offender intended to commit the offence charged. However, it can be safely stated that the question of whether an accessory after the fact is an accomplice is academic as his evidence must be considered on the same principles as that of an accomplice. Where he has played an active role his evidence must be corroborated. On the other hand if his role has been passive his evidence may be accepted with the usual corroboration warning.

On the facts of this case PW4 played a very active role in his capacity as an accessory after the fact. His evidence must therefore be corroborated.

In dealing with the nature of evidence that can be termed as being corroborative Lord Reading CJ said in *R v. Baskerville* [1916] 2 KB 658 at p. 667:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

It was further held in that case (at p. 667) that the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. In commenting on the same issue *Sarkar on Evidence*, 15th edn, Reprint 2004 Vol 2 says at p 2099:

> The corroboration need not be of a kind which proves the offence against the accused. It is sufficient if it connects the accused with the crime (*Swaminathan v. S* AIR [1957] SC 340). The corroboration need not consist of evidence which standing alone would be sufficient to justify the conviction. All that is required is that there should be sufficient corroborative evidence to show that the approver is speaking the truth with regard to the accused whom he seeks to implicate (*Bishnupada v. R* AIR [1945] C 411; *Autar Singh v. S* AIR [1960] Pu 364; *Rameshwar v. S* AIR [1952] SC 54; see *Swaminathan v. S*, sup; *Ambika v. R* 35 CWN 1270).

Of the information supplied by the accused to the police under s. 27 the most significant one is when he said, "Sinilah tempat saya tanam kepala Ali" followed by the discovery of the head. If the information had been merely that "sinilah kepala Ali ditanam" it would only support the evidence of the commission of the crime as it will indicate only the accused's knowledge of the burial of the head. The fact that the information reveals that the accused had buried the head at the particular spot which was known only to himself coupled with his pointing out of the parang, the rattan cane, the trousers of the deceased and the plastic bag used in wrapping the deceased's head affect the accused by tending to connect him with the crime. This is enhanced by the admission made by the accused when he told PW4 not to worry as everything was done by him and if arrested he will be the person who will be responsible. Ordinarily this admission may not carry much weight on its own as it is from a witness in the position of PW4. However, on the facts of this case it cannot be disregarded as it was not subjected to any cross-examination by the accused nor was it denied or explained by him. It assumes greater significance when judged together with the information supplied by the accused that led to the discovery of the objects and the request by the accused to PW4 not to mention the incident to anyone including the police. All these have the cumulative effect of tending to connect the accused to the crime. We are therefore satisfied that there is sufficient evidence to support the testimony of PW4 not only to show that the crime had been committed but also that it was the accused who had committed it. The evidence of PW4 can therefore be acted upon to make out a case against the accused as done by the learned judge.

(d) The Standard Of Proof Applied By The Learned High Court Judge At The End Of The Case

The argument that the learned judge had applied the wrong standard of proof is based on the last paragraph of his grounds of judgment where he said:

> Having come to this conclusion, I therefore am of the opinion that the defence had failed, on the balance of probabilities to cast reasonable doubt, on the prosecution's case, I therefore found the accused guilty and convict him of the offence of murder, in contravention of section 302 Penal Code and sentenced him to death.

Read in isolation this passage may appear to portray the impression that the accused had failed to cast a reasonable doubt on the balance of probabilities in the case for the prosecution. This would amount to a wrong burden being placed on the accused. The truth emerges when one reads the earlier part of the judgment of the learned judge where he said:

> The prosecution having proved its case against the accused beyond reasonable doubt, the onus now lies with the defence to show to the court that on the balance of probabilities he has a plausible defence.

The reference to the standard of proof in the last paragraph of the judgment is therefore clearly a reference to the burden with regard to the defence of intoxication.

Upon a consideration of the arguments advanced before us we are satisfied that the accused was correctly called upon to enter his defence. His defence was one of denial that he had committed the offence and that it was PW4 who did it. The learned judge had correctly assessed the defence advanced against the background that it was never put to the witnesses for the prosecution. It was accordingly rejected. In dealing with the defence of intoxication advanced by the accused the learned judge said:

> On the issue of intoxication there was no scientific evidence placed before me to support the contention of the defence.

Having said that he considered the conduct of the accused both before and after the commission of the crime and rejected the defence. In our opinion he was correct in doing so. Scientific evidence to prove intoxication can be provided by an analysis of blood and urine samples which will show the level of alcohol in the body. However, it must be observed that such results are not conclusive to determine the degree of intoxication of a person. As Chao Hick Tin JC said in *PP v. Ramasamy a/l Sebastian* [1991] 1 MLJ 75 at p. 81:

> In any event, from the evidence of the experts, the blood alcohol level itself can never be conclusive to determine the degree of intoxication of the accused. Different people react differently to the same blood alcohol level. It makes a great difference whether the person is or is not an experienced drinker. In our judgment, and here we accept the opinion of Dr Chan (PW15), the more reliable indicator of the state of mind of the accused must be the conduct of the accused immediately prior to and after the offence.

It must be observed that what is in issue in a defence of intoxication is the state of mind of the person concerned in order to determine whether he could have formed the necessary intention. The best evidence to establish his state of mind is his conduct prior to, at the time of, and after the offence as different people react differently to the same blood alcohol level. Needless to say scientific evidence is significant to explain the conduct of the person. In other words it will corroborate the evidence of conduct. Its absence cannot therefore be fatal.

In the upshot we dismiss the appeal and confirm the conviction and sentence imposed by the High Court.